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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 256

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division, United States Department of Labor, *Petitioner,*

v.

HUNT FOODS, INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 21-27) is reported at 74 F. Supp. 182. The opinion of the Circuit Court of Appeals for the Ninth Circuit, and the dissenting opinon (R. 195-202) are reported at 167 F. (2d) 905.

JURISDICTION

The jursdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether some few of respondent's employees, engaged in the processing of small whole apples and perishable apple peelings and cores into apple juice, apple cider, and apple pomace, are engaged in "the first processing of . . . perishable or seasonable fresh fruits" within Sections 7(c) and 7(b)(3) of the Fair Labor Standards Act.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Fair Labor Standards Act and the regulation involved are set forth in the Petition at pp. 2-4.

STATEMENT

This litigation concerns the activities of about a dozen employees working at a small processing plant at Graton in the apple orchard area of California (R. 103). In the four harvesting seasons involved, 1940 through 1943, these men were employed under union labor contracts in the seasonal production of apple juice, cider, and apple pomace (R. 30-32). Ordinarily, in the canning or dehydrating of fresh apples, only the larger and better apples are sliced and utilized; the smaller whole apples (commonly called culls) and the peelings and cores are ground up together, pressed to extract the juice, and the perishable residue dried into what is called apple pomace.

At Graton the fruit processed by respondent consisted of 28% fresh whole small apples and 72% of apple peelings and cores from the larger apples during the year 1943 and somewhat smaller percentages of fresh whole apples during the years 1942 and 1944 (R.

10, 30). These apples and cores and peelings were obtained from farmers and from dehydrators in the immediate area around the plant, in which there are many apple orchards (R. 74, 81-82, 116). Part of the fresh apple cores and peelings are received at the Graton plant by means of a conveyor belt from a dehydrating plant across the road. (R. 74-75). These raw materials are processed "as quickly as possible" into apple juice, apple cider, and apple pomace to prevent spoilage. (R. 82).

The fresh apples, peelings and cores when received at the Graton plant are put into a pit from which they are shoveled onto a conveyor. The conveyor carries the raw material to a grinder which grinds up the apples, peelings and cores. The ground material from the grinder falls onto another conveyor belt leading to the hydraulic presses, where the juice is expressed from the ground apples. The juice is drained into tanks alongside the presses, pumped immediately to fermenting tanks, allowed to ferment for three days and pumped to storage tanks. (R. 75-80).

The apple residue remaining after the juice is pressed out is of course highly perishable and is immediately placed on a conveyor to a pulverizing machine, where it is broken up into small pieces. The pulverized material then goes to a rotary drier for drying and is sacked out of the drier. This dried residue is called pomace. Not more than one hour elapses from the time the fresh apples, peelings and cores are put into the grinder or crusher until the juice is in the tanks and the pomace is sacked and stored (R. 81, 126).

Section 7(c) of the Act grants an exemption from the overtime provisions of the Act for a period of not more than 14 workweeks in any calendar year to employees in any place of employment where their em-

ployer is engaged in "the first processing of . . . perishable or seasonable fresh fruits or vegetables . . .". Section 7(b)(3) provides a partial overtime exemption for 14 workweeks for employees employed "in an industry found by the Administrator to be of a seasonal nature" if such employees receive time and one-half compensation for employment in excess of 12 hours in any workday or 56 hours in any workweek.

Under Section 7(b)(3) the Administrator has determined that "the first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature within the meaning of Section 7(b)(3) of the Fair Labor Standards Act and Part 526 as amended of the Regulations issued thereunder". 5 F. R. 3167. Despite an apparently different approach in the court below, petitioner now concedes that "first processing of perishable or seasonable fresh fruits" has the same meaning in his regulation as the identical phrase has in Section 7(c) of the Act (Petition, p. 7). The sole issue, therefore, is whether these operations in the processing of apples are covered by Section 7(c).

Where large apples are cut up for canning or dehydrating, and the resulting peelings and cores and rejected smaller apples are processed into apple pomace, under the same roof at the same time in a continuous operation, it has always been believed, has been judicially determined, and it is apparently conceded that all of the operations are covered by Section 7(c). *McComb* v. *Musselman Co.*, 167 F. (2d) 918, (C. C. A. 3d, 1948); Petition, p. 12. Similarly, if the smaller or cull apples alone are ground up, the juice expressed, and the residue dried into pomace, the Administrator concedes that the operations would qualify for the Section 7(c) exemption. What is involved in the some-

what unique circumstances of the present litigation is a variant of these two types of operations—and one apparently limited to this particular area, if not to this particular plant.

Toward the end of the harvesting season, in October 1944, the Administrator brought an action to enjoin the respondent from violating the Act.[1] The District Court found that in off seasons overtime was paid in accordance with the statute, and that during the processing season the employees were paid overtime in accordance with the labor union contract provision (R. 32). In the case of some employees, however, this did not coincide with what would be required if Section 7(c) and Section 7(b)(3) were applicable. The District Court upheld respondent's contention that its activities were exempt, and that it

> "was exclusively engaged at its Graton plant in the processing of fresh whole apples and fresh peelings and cores of other whole apples to extract juice and turn the remainder of the pulp into pomace in a seasonal operation and that such is and constitutes the first processing of a perishable and seasonal fruit with regard to both the juice and the pomace." (R. 33).

The Circuit Court of Appeals affirmed the judgment of the District Court. (R. 195-202).

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[1] The complaint originally included a charge of failure to keep the records required by Section 11(c). But the Administrator later conceded, and the trial court found, that the respondent's records were properly kept and that no ground for injunctive relief existed on this charge. (R. 21, 196.) By stipulation in the lower court, a successor corporation was substituted as defendant-appellee. (R. 190-191.)

ARGUMENT

The issue in the present case is uniquely narrow, and no amount of strained semantics can convert it into one warranting review by this Court on certiorari. Of the five agricultural industries separately and specifically dealt with in Section 7(c),[2] we are here concerned only with one of them and within it only a particularized sub-form of processing operations on a single commodity.

The case does not in any sense broadly concern the meaning of the "first processing of perishable or seasonal fresh fruits and vegetables." Nor does determination of any question here involved control the application of the Act to fruits alone, to the single fruit, apples, or even to the asserted distinctions between big apples and little apples or various parts of the apple such as peelings and cores.

To focus attention on precisely what is offered as an issue for Supreme Court determination, it may be pointed out that the Administrator does not question that the canning or dehydrating of apples is covered by Section 7(c), nor does he question that the grinding up, pressing and drying of small apples into apple juice and pomace is covered by that provision. Likewise it is settled that the conversion under the same roof of parts of the apple, the peelings and cores derived from canning or dehydrating, into apple juice or pomace, is embraced within the exemption. Moreover, if one adds to the perishable parts of the apple

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[2] The five industries, clearly disclosed in the text of Section 7(c), are (1) the making of dairy products; (2) the ginning and compressing of cotton; (3) the processing of sugar containing crops into raw but not refined sugar; (4) the first processing or canning of perishable or seasonal fresh fruits, vegetables, or any agricultural or horticultural commodity; and (5) the handling, slaughtering, or dressing of poultry or livestock.

(the peelings and cores) being made into apple juice or pomace, the smaller or cull apples not suitable for other purposes, the exemption is not affected.

The peripheral and particular set of facts here presented involve the situation where all of these things are done not under the same roof, but where instead the cores and peelings are immediately carried by a continuous conveyor across a 30-foot space to respondent's plant where they are immediately ground up with the smaller apples (see diagram, R. 126); in other instances, the peelings and cores are received from other neighboring dehydrators, but whether by conveyor or hand truck the record does not reveal. (R. 74).

There is no factual difference in what is done; there is no difference in the conceded perishability of the material being handled or in the non-perishable end products; there is no difference in the time within which the job must be done or the time which it takes to complete it. The only difference is that peelings and cores are carried from the plant of one man across the road to the plant of another who there includes them with the cull or smaller apples which he has purchased from farmers, and converts the combined material into apple juice or pomace.

On these individual facts the decision of the District Court was manifestly correct. There is no asserted conflict of decision nor in the light of the legislative history of the Act could any other result have been reached. Manifestly, there is no important question of Federal law requiring decision by this Court.

I.

The Decision Below Is Clearly Correct

After a searching examination of the entire operation, including among other things the analysis of diagrams showing in detail precisely what was done,[3] the District Court concluded that respondent's operations were clearly within the meaning of Section 7(c). It was not questioned that the raw materials utilized were perishable, or that they had to be processed "as quickly as possible" (R. 82). The Administrator suggested, however, that the term "fresh" apples applied only to the larger apples and not to the smaller whole apples which were not suitable for packing or dehydrating. This was considered by the District Court as sophistry. (R. 25). Indeed, this attempted distinction between perfect and imperfect apples seems to indicate that the Administrator believed that only perfect apples are the products of Nature, while the imperfect apples are the results of some sort of human interference in natural processes.

Essentially, the Administrator's argument in the Courts below comes down, as here, to the position that one part of the apple might be a "fresh fruit" but that

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[3] Even without reference to the supporting legislative history, it may be said that Section 7(c) reflected the Congressional understanding of the distinction between rural handling and processing of perishable agricultural commodities and conventional industrial operations. Thus reviewed, the diagram offered by the Administrator (R. 126) is illuminating: On three sides of respondent's plant he discloses "open fields." On one side there is noted an "unpaved road." The peelings and cores from the adoining dehydrating plant (whose operations are admittedly within the exemption) travel on a conveyor a distance of only 30 feet. While this is referred to as a "road," it is shown on the diagram as merely an open space.

another part of it might not be. It is urged here, as it was repeatedly below, that apple cores and peelings are not fresh fruit but are "by-products." This is said to rest upon the theory that the words of the Act must be "according to the sense of the thing" as the ordinary man would understand them.

Of course, if statutory interpretation rested on any such *a priori* basis—divorced from the realities of the situations for which Congress was legislating—it might be observed that many an ordinary man has readily consumed an entire apple without apparently realizing that one part was fresh fruit and the other part something else. But as will be seen below, every court has recognized that Section 7(c) was intended to permit the conversion of everything yielded by the harvest into a non-perishable form. See *McComb* v. *C. H. Musselman Co.*, 167 F. (2d) 918 (C. C. A. 3d, 1948).

In reality, this resort to the dictionary to call one part of an apple a fresh fruit and another part a by-product is an attempt to say that Section 7(c) deals only with the edible portions of agricultural commodities. This idea was suggested below in the Administrator's argument that "fresh fruits" include "the main edible portions after coring, slicing, or peeling." (Brief for Appellant, p. 15). Calling one part of the apple "fresh fruit" and another part of that same apple a "by-product" is a distinction which few "ordinary men" can follow. As the Court below aptly stated:

> "Another obvious fallacy is the argument that peelings and cores of fresh apples are not 'perishable and seasonal fresh fruit', while the remainder of the fruit falls into that classification." (R. 25).

In other words, when a boy divides an apple with a friend by breaking it in half, only the original owner is

eating "fresh fruit"—the donee is consuming a "by-product" derived from the processing operation of breaking the apple in half. We submit that the Administrator's attempted distinction is so artificial as to have no relation to the statute or to Congressional intent.

As an alternative to the argument that one part of an apple is different from another part of an apple within the language of Section 7(c), the Administrator urges here, as he did unsuccessfully below, that the conversion of peelings and cores (along with smaller apples) into apple juice and pomace is not the *first* processing but a second processing. Just how strained this position is can be discerned from a realization of the narrow facts for which it has apparently been formulated. For inescapably the squeezing of peelings and cores to get the juice and the drying of the remaining masses to get the pomace is "first processing" when performed under the same roof. In other words precisely the *same* operations on the *same* material within the *same* time limits under identical conditions is sometimes first processing and sometimes apparently not. The Administrator's difficulty with his own concept is illustrated in the Petition (p. 13):

> "The Administrator has not rigidly limited 'first processing' to the first act that changes the natural form of the commodity if the subsequent acts are performed as a part of a continuous process or series of operations beginning with the whole fruit and continuing until either a break occurs in the operations or the product is rendered nonperishable."

Taken literally, this means that if the two rural operations here concerned were under the same roof, or for

that matter under the same ownership, the operations would be properly described as "first processing."

From any realistic point of view, "no break occurs in the operations" since the peelings and cores are continuously conveyed from the adjoining dehydrating plant to the press. Nor are these peelings and cores rendered nonperishable in the dehydrating plants.[4]

Moreover, the Administrator apparently has now abandoned the contention that there cannot be two steps in the first processing of the same apples. Yet there is renewed insistence that the decision below construes the term "first processing" in a manner inconsistent with the plain meaning of the word "first" (Petition, p. 15). This contention rests on a direct contradiction. Cutting and peeling is admittedly only an initial step in the first processing of that part of the apple which is dehydrated. The rest of the dehydrating operation, nevertheless, is still first processing. Yet the Administrator contends that the same cutting and peeling is the entire first processing operation when he is talking about converting other parts of the very same apples into juices and pomace. This is making a fortress of the dictionary to exclude reality. Washing is usually the first step in processing any fruit or vegetable. Frequently this washing will take place outside the processing buildings. The Administrator's

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[4] In addition, the Administrator's argument completely ignores the fact that a substantial part of the raw material used in respondent's plant consists of whole apples. As to these, it is conceded that what is done is "first processing." Petition, p. 10, note 5. In the court below reliance was had by the Administrator upon the term "functionally interrelated,"—an impressive but vague term which clearly applies to two operations in which two nonperishable products are made from the various parts of the same perishable apple.

logic would lead to the absurd result that the washing constituted "first processing" and all remaining operations necessary to achieve a nonperishable product constituted second processing.

The fallacy in all of this is pointed up by the Administrator's contention (Petition, p. 12) that the coring and peeling of whole apples is the "first processing," and that "the operations performed upon them in another plant, for another business, by another employer is a *subsequent* processing." If the peeling and coring occurred in respondent's plant, and the apple slices were then conveyed to the dehydrating plant, by like logic respondent's operations would become the "first processing" and the dehydration the "subsequent" second processing. To escape this dilemma the Administrator concedes (Petition, p. 13) that he will recognize within the term "first processing" any continuous process or series of operations "until either a break occurs . . . or the product is rendered non-perishable." But to make the simple test applied by the lower court dependent upon a series of complicated extrinsic facts can lead only to confusion. Would common ownership of two rural plants separated by a roadway and connected by a conveyer furnish sufficient continuity? Would operations by two independent companies in the same building foreclose the "break"? Would the coring and peeling, dehydrating, and manufacture of pomace carried on under a single roof with hand trucking of materials result in there being a "break" in operations? On the Administrator's view, to obtain the benefit of a "continuous operation," respondent apparently must buy its neighbor's dehydrating plant or conduct its operations in the same building with its neighbor. Manifestly, what is "first processing" under Section 7(c) does not turn on where the peeling knife

is located, who owns the real estate, or the peculiarities of where these rural roads happen to run.

II.

There Is No Conflict of Decision

Petitioner asserts that the decision in the instant case is contrary to the consistent interpretation of the Administrator whose views as to the scope of Section 7(c) are entitled to "great weight." However this may be, it is not the same as a conflict of decision among lower courts which have examined the meaning of Section 7(c) as applied to either the present narrow set of facts or even to the concept of "first processing" of fresh fruits and vegetables. In *Hendricks* v. *Di Giorgio Fruit Corporation,* 49 F. Supp. 573 (D. C. N. D. Cal., 1943), the argument was advanced that in the converting of grapes into fortified wine, the crushing of the grapes and the fermenting of the juice could be considered as "first processing" operations but that bottling the fermented wine or fortifying it in a continuous process could not be included. As the Court pointed out in rejecting the Administrator's contention:

> "In Section 7(c) the phrase is used in conjunction with the words 'canning' and 'packing'. Fresh fruits and vegetables are commonly subjected to various processes which are analogous to canning or packing but which are not identified by those terms. It seems clear that 'first processing' was used to cover such analogous processes. To hold that the term covers only the first step in such process, as, for example, the crushing of the grapes in the instant situation, would not only be unreasonable but would tend to defeat the obvious purpose of the exemption. The legislative history of the

> Act shows that Congress realized that perishable or seasonal fresh fruits or vegetables must be processed when they reach the proper stage and that such stage depends upon natural factors which man cannot control." (p. 575).

In like fashion, the two District Courts and the two Circuit Courts of Appeals at opposite ends of the country in Pennsylvania and California, had little difficulty in concluding that, as the Third Circuit remarked in *McComb* v. *C. H. Musselman Co.*, 167 F. (2d) 918 at 919, in making apple pomace:

> ". . . the first processing would continue until the drying under heat was finished. We cannot see that it is any the less 'first processing' because part of the raw material from which this pomace is made consists of cores and peelings. We think the 'first processing' certainly lasts from the time the apples begin their journey from the warehouse until the drying of the pulp is over and the product no longer is in the perishable state."

Or as the Court below in the instant case observed:

> "Whether dehydrating one part of the apple and making of juice and pomace from other parts of the same apple is accomplished on a continuous production line under one roof, or is accomplished by dividing the practically simultaneous operations between two adjacent producers, would seem to be irrelevant. The dehydrating, and making of juice and pomace are all part and parcel of the speedy and continuous process of converting the perishable apple into a non-perishable salable product. Appellant himself concludes that the first process-

ing exemption 'was designed to cover only those integrated activities which are part of the continuous operation of converting the whole fresh fruit, as it comes from the farm, *into a non-perishable product.*' (Emphasis supplied.) If this hurried and continuous process is deemed to end when part of the apple (the peels and cores) has not been processed at all and is still in its natural and perishable state, what seems to us to be the logical objective of the exception to the forty hour week requirement is frustrated, and a large proportion of this part of the fruit may easily become a total loss." (R. 197-198).

III.

There Is No Important Question of Federal Law

Petitioner insists, however, that implicit in these particularized subtleties as to big and little apples, and parts of an apple, there lurks an important question of Federal law which this Court should settle. Strangely, there is no citation to any pending litigation, no indication that in the ten years' of enforcement these suggested issues on other commodities differently processed have in fact arisen, and no contention that in the list offered there is actually involved any similar problem of converting a perishable raw material into a "nonperishable and salable product."[5] The mere listing of remote possible analogies does not make an important Federal question.

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[5] To illustrate: Among the applications of the Act said to be affected is the manufacture of pectin. Petition, p. 16. In fact, pectin is manufactured from dried apple pomace. No one has contended that making pectin from dried, nonperishable pomace is the "first processing" of apples. It is a wholly different process. The suggested apprehension is far-fetched and irrelevant.

To buttress this familiar argument of "this-decision-is-correct-but-see-where-it might lead," there is resort to other parts of the Act. It is suggested that decision that each part of an apple is as much a fresh fruit as another and like conversion from perishable to non-perishable state is equally first processing "may affect" the interpretation to be placed upon other provisions of the statute. The same idea emerges in the suggestion that what is determined with respect to apples might bring into question the handling of hoofs, offal and other components of livestock or the "processing of milk, whey, skimmed milk or cream into dairy products, the processing of cotton seed," the processing of sugar beets, sugar beet molasses, sugar-cane, or maple sap into sugar (but not refined sugar), or into syrup, etc.[6] The short answer to this point is that Congress necessarily used different words, of varying content, to deal with different operations on different agricultural commodities. Congress used them in the common sense meaning. As Mr. Justice Frankfurter has observed, in interpreting the words of a statute:

> "It will help to determine for whom they were meant. Statutes are not archaeological documents to be studied in a library. They are written to guide the actions of men. As Mr. Justice Holmes remarked upon some Indian legislation 'The word was addressed to the Indian mind.' If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be

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[6] The fantastic suggestion (Petition, p. 11) that the instant decision might affect by analogy the making of corn corn pipes demonstrates the paucity of substance in Petitioner's argument. Section 7(c) as applied always relates the concept of a "perishable or seasonal fresh fruit or vegetable" to the situation where the processing operation is controlled by the necessity for converting raw materials into non-perishable or marketable form.

> read with the minds of ordinary men. If they are addressed to specialists, they must be read by judges with the minds of the specialists.
>
> "And so we assume that Congress uses common words in their popular meaning, as used in the common speech of men. The cases speak of the 'meaning of common understanding,' 'the normal and spontaneous meaning of language,' 'the common and appropriate use,' 'the natural straightforward and literal sense,' and similar variants." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. R. 527, 536 (1947).

Thus, if elaborate argument were necessary to meet the Administrator's point that one part of a statute is to be interpreted by looking at other parts, the simple answer would be that the words "the first processing of . . . perishable or seasonal fresh fruits [illegible] vegetables" were addressed to those engaged in that business and that as a practical matter the conversion of peelings and corings, and small whole apples, into cider and pomace has always been a part of the apple processing industry.

The language referring to other industries is similarly directed to what is done in those other industries—to the "handling, slaughtering ,or dressing" of poultry or livestock (an obviously narrower specification), to the first processing of milk, whey, skimmed milk, or cream *into dairy products*, the processing of various types of sugar into sugar but *not* refined sugar. Presumably, the legislators were aware that farmers may deliver either skimmed milk or cream to a dairy, and that the making of maple sap into sugar or syrup is different from the converting of raw sugar into refined sugar. Plainly, Congress was using different words for different industries, and a broad axe reading of

the entire section urged by petitioner would do violence to the statute.

Hence the argument by attempted resort to other phrases of the statute covering operations in other industries must fail. The provisions of the Federal Fair Labor Standards Act read on realistic situations. Here above all, sweeping generalizations or decision divorced from actual fact are not helpful and are often productive of confusion. A determination on the particular facts that the processing of one part of an apple is as much within the exemption as the processing of another part of an apple does not and should not control the meaning and application of other sections of the law employing different phrases in the context of different operations in dissimilar industries. By the same token, the interjection of other sections and different possibilities of application does not convert a correct decision in a simple case into an important question of Federal law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1948.